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Nos. 84-801 and 84-805

In The

Supreme Court of the United States

October Term 1984

MIDLANTIC NATIONAL BANK,
Petitioner (No. 84-801),

vs.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent,

and

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner (No. 84-805),

vs.

THE CITY OF NEW YORK and STATE OF NEW YORK, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

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PETITIONS FOR CERTIORARI FILED NOVEMBER 14, 1984
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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit correctly held that abandonment of PCB-contaminated waste oil was inappropriate under the Bankruptcy Code, 11 *U.S.C.* § 554(a), when abandonment by the trustee in a liquidation proceeding would violate state environmental laws and threaten the public safety?

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STATEMENT OF THE CASE

At issue in these consolidated cases is whether a trustee in bankruptcy may abandon property of an estate under 11 *U.S.C.* § 554(a)* when abandonment would per-

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* 11 *U.S.C.* § 554(a) provides that, "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

petuate a public nuisance, violate state and federal environmental laws, and threaten the public health, safety, and welfare. Both cases involve property contaminated with polychlorinated biphenyls (PCB's) that became part of the estate of Quanta Resources Corporation when that company filed a bankruptcy petition in October 1981. In the New Jersey case which will be the focus of this brief, the United States Bankruptcy Court for the District of New Jersey held, over the objection of the New Jersey Department of Environmental Protection ("NJDEP"), that abandonment of the contaminated property by the trustee was appropriate under 11 *U.S.C.* § 554(a) because the property was burdensome and of no value to the estate. A similar decision had previously been rendered in the New York case by the same Bankruptcy Court and was affirmed by the United States District Court for the District of New Jersey. Appeals in both cases were reviewed by the United States Court of Appeals for the Third Circuit, which reversed the holding below. In reversing, the Third Circuit held that abandonment was not justified in either case due to the serious risk to the public and the environment that would result. Petitions for *certiorari* from these holdings were filed by Thomas J. O'Neill, trustee in bankruptcy of Quanta, and by Midlantic National Bank ("Midlantic"), a creditor of Quanta with a security interest in some personal property of the estate. This Court granted *certiorari* and consolidated the cases on February 19, 1985. This brief, submitted on behalf of NJDEP, addresses the issue of abandonment in the context of the facts and State laws pertinent to the New Jersey case.

Quanta Resources Corporation leased a site along the Hudson River in Edgewater, New Jersey, at which it

operated a facility for the processing of waste oil and oil sludge. Quanta began operating at the site in mid-1980 when it purchased Edgewater Terminals, Inc., which had previously conducted a waste oil business at the same location. The waste oil industry in New Jersey is regulated by NJDEP under the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* Pursuant to the regulatory scheme established under this State statute, Edgewater Terminals, Inc., had obtained a temporary operating authorization ("TOA") from NJDEP which allowed the facility to accept waste oil and sludges, but specifically prohibited the acceptance of PCB's (R. 11-12).*

Shortly after Quanta's assumption of operations at the Edgewater site, NJDEP entered into an Administrative Consent Order with Quanta in which the company agreed to apply for a TOA in its own name. This Order, dated August 6, 1980, also cited the facility for leaks and poor maintenance, and directed Quanta to remedy these serious deficiencies. Pending approval of this application, Quanta agreed to conduct its operations in accord with the TOA issued to Edgewater Terminals, Inc. (R. 13 to 22.)

On May 29, 1981, NJDEP issued a TOA to Quanta in conjunction with another Administrative Consent Order. This Order directed Quanta to remove all sludges from the site, to improve maintenance procedures, and to rectify the "chronic spills and leaks" that were occurring at

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* Pertinent documents from the record in this case were included in the appendix filed with the United States Court of Appeals for the Third Circuit. "R" as used in this brief refers to that appendix.

the facility. NJDEP made the operation of the TOA contingent upon Quanta's satisfaction of the Department's demand for the improvement of environmental conditions at the site (R.22-24). In addition, the TOA expressly provided that, "[t]his facility is *not* authorized to accept PCB waste . . ." (emphasis in original) (R.25-37,34).

Less than one month after the issuance of this TOA, however, NJDEP investigators tested Quanta's tanks and discovered significant PCB-contamination. NJDEP then directed Quanta to cease operations at the Edgewater facility, which Quanta did on July 2, 1981. Although Quanta had represented to NJDEP that the company was interested in resolving the environmental problems at the facility, negotiations through the end of September 1981 proved inconclusive. Consequently, on October 7, 1981, NJDEP issued an Administrative Order to Quanta formally revoking its TOA and directing the company to prepare and execute a closure plan for the facility. This Order required Quanta to remove all hazardous waste in the closure process, including all material contaminated with PCB's (R.42-45). Quanta never complied with this Order.

On October 6, 1981, however, Quanta filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. Quanta remained in possession of the property of the estate as debtor-in-possession until November 11, 1981. At that time the reorganization was converted to a Chapter 7 liquidation and Thomas J. O'Neill took control of the estate as trustee in bankruptcy.

The estate consisted of non-New Jersey real property, a leasehold in the Edgewater facility, various equipment,

and oil, some of it contaminated and of no value, and some able to be sold. On April 5, 1982, Midlantic, which had a prebankruptcy security interest in all inventory and equipment of the debtor, obtained an order from the Bankruptcy Court establishing the extent and amount of Midlantic's lien: $643,660.68 plus interest from October 6, 1981.

On August 24, 1982 an order was entered by the Bankruptcy Court approving the sale by the trustee of all equipment and vehicles of the estate for $315,145, which after deducting for liens on the vehicles and the cost of the sale, realized just over $200,000 for the estate.

In October 1982, the trustee filed the first of a series of notices proposing to abandon approximately 1,600,000 gallons of mixed industrial and automotive waste oil that were located at Quanta's facility in Edgewater. According to this notice, approximately half of this oil was contaminated with PCB's and hence was not saleable, while the remainder was subject to an offer of sale previously approved by the Bankruptcy Court but not executed (R.4). NJDEP opposed the abandonment, filing papers to this effect (R.5-10). At the time of the proposed abandonment, the facility was "in an extreme state of disrepair." Affidavit of Frank Gagliano, Senior Environmental Specialist at NJDEP, dated September 27, 1982 (R.45-48, at 45). Many of the tanks were leaking, the oil-water separator—a critical pollution control device—was not working, and seepage of waste oil into the Hudson River was occurring. Tank ruptures resulting in large spills of contaminated oil into the River were feared (R.46).

Despite the ongoing environmental problems at the Quanta facility and the attendant risks to the public health

and safety, and despite the objections of NJDEP, the United States Bankruptcy Court for the District of New Jersey issued an order authorizing the abandonment of the contaminated oil on May 20, 1983 (R.1-2, also included in Appendix I attached to the petition for *certiorari* filed by Thomas J. O'Neill, trustee in bankruptcy). The Order also authorized the trustee to abandon Quanta's leasehold interest in the Edgewater site and any personal property of the debtor still located at the facility. The Order directed the trustee to retain possession of the non-contaminated oil, however, pending its sale.

On June 21, 1983, the Trustee completed the sale of the noncontaminated oil for $257,494.14. The net proceeds to the estate, after costs of sale, were approximately $200,000. By consent of the trustee, NJDEP, Midlantic and the New Jersey landlords, the proceeds of the sale were distributed to Midlantic without prejudice to the right of NJDEP to recover from all parties such funds of the estate, including the proceeds of the oil sale, as NJDEP might gain entitlement to through further prosecution of the case.

Thereafter, upon the consent of the parties, NJDEP filed a direct appeal of the order of the Bankruptcy Court authorizing abandonment to the United States Court of Appeals for the Third Circuit pursuant to 28 *U.S.C.* § 1293(b) (R.48-49). In two companion decisions issued on July 20, 1984, *Matter of Quanta Resources Corp.*, 739 *F.*2d 912 (3d Cir. 1984) (New York case), and *In re Quanta Resources Corp.*, 739 *F.*2d 927 (3d Cir. 1984) (New Jersey case), the Third Circuit held that the trustee in bankruptcy could not abandon contaminated property in the Quanta estate as long as that property constituted a

threat to the public health and safety. In this regard the court stated that:

> If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation—the substitution of governmental action for citizen compliance — without an indication that Congress so intended. [739 *F.*2d at 921-922 (footnote omitted).]

To reach this holding, the Third Circuit analyzed the relationship between State environmental laws and the abandonment power created by Congress in 11 *U.S.C.* § 554. It found in this regard that § 554 did not preempt State police power regulation and that, in fact, the judge-made law upon which § 554 was based had itself prohibited abandonment where such an action would endanger the public health and safety, citing *Ottenheimer v. Whitaker,* 198 *F.*2d 289 (4th Cir. 1952), and *In re Lewis Jones, Inc.,* 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974). Furthermore, the Third Circuit found evidence of Congressional intent to defer to State police power regulation of a business involved in bankruptcy proceedings in 11 *U.S.C.* § 362(b)(4) (exception to automatic stay of actions against debtor for the enforcement of a governmental unit's police or regulatory power), and 28 *U.S.C.* § 959(b) (requiring a trustee to manage and operate property in his possession according to the laws of the State in which the property is situated). The court also relied upon the equitable powers vested in the Bankruptcy Court in 28 *U.S.C.* § 1401, and the fact that the equities in this case

favored protection of the public safety over preservation of the estate for the benefit of creditors, to support its decision that abandonment of the contaminated property was improper. Finally, the court below expressly declined to reach the issue of who should pay for the clean-up of the Edgewater facility. 739 *F.*2d at 929.

Both the trustee in bankruptcy of the Quanta estate and Midlantic National Bank, a creditor of Quanta's New Jersey property, filed petitions for *certiorari* in this Court from the decisions of the Third Circuit. These petitions were granted, and the New York and New Jersey cases were consolidated, on February 19, 1985. Since that time the United States Environmental Protection Agency ("EPA") has undertaken immediate and planned removal actions at the Quanta site in Edgewater pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 *U.S.C.* § 9601 *et seq.*, and 40 *C.F.R.* 300.65 to 300.67. In this regard, NJDEP has entered into a cooperative agreement with EPA in which the State has agreed to pay ten percent of the cost of the planned removal. Although the purpose of these cleanup actions is to stabilize the site and prevent further pollution of the Hudson River and the property surrounding the facility, this governmental action is of an emergency nature and will not completely remedy the environmental problems at the site.

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SUMMARY OF ARGUMENT

The power of a trustee in bankruptcy to abandon property burdensome to the estate was codified in 11 *U.S.C.* § 554 which brought the previously judge-made law of abandonment into the Bankruptcy Code for the first time. 4 *Collier on Bankruptcy* § 554.01, at 554-2 (15th ed. 1985). Since prior law had established that the exercise of the abandonment power was not absolute, but rather was subject to police power regulations and could be denied in the public interest — *Ottenheimer v. Whitaker,* 198 *F.*2d 289 (4th Cir. 1952); *In re Lewis Jones, Inc.,* 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974); 4A *Collier on Bankruptcy* § 70.42[2] at 502-504 (14th ed. 1978)—the codification of the abandonment power implicitly incorporated this important limitation. For, where Congress adopts legislation containing terms and concepts that have previously accumulated meaning under equity or the common law, a court should infer from such use that Congress intended to incorporate the established meaning into the statute. *NLRB v. Amax Coal Co.,* 453 *U.S.* 322, 329 (1981).

The "public safety" exception to the abandonment power should be applied in this case because the property sought to be abandoned by the trustee constituted a continuing health and environmental threat in that it was contaminated with PCB's, was leaking onto the ground and into the Hudson River and, due to poor maintenance, was so unstable that a major spill was likely unless preventive measures were taken. The poor condition of the property also constituted a public nuisance in ongoing violation of State and federal laws such as the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11a *et seq.*,

the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.*, CERCLA, 42 *U.S.C.* § 9601 *et seq.*, and the Toxic Substances Control Act, 15 *U.S.C.* § 2601 *et seq.* Since abandonment would remove control of the property from the trustee, who had some assets available that could have been used for stabilization and other remedial activities, and would return the property to the assetless corporate shell of the debtor, such action would further endanger the public safety and violate State and federal environmental laws. Under such circumstances, abandonment cannot be condoned.

Since Congress implicitly incorporated the public safety exception to abandonment in 11 *U.S.C.* § 554, there is no real issue of federal preemption of State police powers in this case. If there were, however, Congress has demonstrated in 11 *U.S.C.* § 362(b)(4) (exception to automatic stay for police power enforcement actions and 28 *U.S.C.* § 959(b) (requirement that trustee manage property in his possession in accord with State laws), that it did not intend the Bankruptcy Code to abrogate a State's police powers or exempt trustees from complying with State law. Moreover, since the New Jersey statutes in question here have federal counterparts with overlapping goals, the bankruptcy and environmental laws should be read in harmony, giving effect to both. *See Ruckelshaus v. Monsanto Co.*, 104 *S.Ct.* 2862, 2881 (1984).

The sole issue addressed below was the propriety of abandonment when the public health and safety are at risk. The Third Circuit expressly refused to reach the issue of entitlement or priority access to the assets of the estate. The "taking" challenge raised by petitioners is thus premature. If it is entertained, however, the challenge should be rejected because it was the illegal acts of the polluter that diminished the value of the creditors' collateral or interest, and not the regulatory activities of the State government undertaken to protect the public. Neither the Constitution nor the Bankruptcy Code requires States to indemnify creditors for poor investments or bad business decisions.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY INTERPRETED AND APPLIED 11 U.S.C. § 554 TO PROHIBIT THE ABANDONMENT OF PROPERTY BY A TRUSTEE IN BANKRUPTCY WHEN SUCH ABANDONMENT WOULD ENDANGER THE PUBLIC SAFETY.

The United States Court of Appeals for the Third Circuit held in its decision in this matter that Congress incorporated the judge-made law of abandonment into 11 *U.S.C.* § 554, thus including in that statutory provision the judge-made restriction that prevents abandonment when such action would place the public at risk and violate laws of a police power nature. The Court below then went on to apply this public safety exception to the facts of this case, concluding that the abandonment of PCB-contaminated waste oil by the trustee would unduly endanger the public and the environment and would consequently be improper. NJDEP submits that these holdings were correct and must be affirmed.

A. In Enacting 11 U.S.C. § 554, Congress Codified The Pre-Existing Judicially-Formulated Rule That Authorized Abandonment Only When It Would Be Consistent With Police Power Statutes And The Public Interest.

The Bankruptcy Act of 1899 contained no abandonment provision. Instead, the principles governing abandonment of property of the estate developed through judicial rulings. *See, e.g., In re Chicago Rapid Transit,* 129 *F.*2d 1, 4 (7th Cir.), *cert. den.* 317 *U.S.* 683 (1942). The early drafts of legislation that evolved into the Bankruptcy Reform Act of 1978 directly incorporated the concept of abandonment into the statutory scheme. Section 4-611 of the proposed Bankruptcy Act of 1973, submitted by the Congressionally-established Commission on the Bankruptcy Laws of the United States, and introduced into Congress as H.R. 10792, 93rd Cong., 1st Sess. (1973), provided:

> The trustee may, subject to the approval of the administrator, abandon to the debtor any property of the estate if it is burdensome or has no net realizable value. Abandonment may be without notice, hearing, or order of the court, but until 10 days after entry of a notation of the abandonment in the file of the case, the abandonment is subject to contest on a complaint filed by a party in interest any time during the pendency of the case.

The Note to Section 4-611 reads in pertinent part: "This section is new but is adapted from Proposed Rule 608. The concept of abandonment is well recognized in the case law. See 4A Collier § 70.42[3] (1967)." This early legislative statement provides an indication of Congress' intent to codify the existing case law on abandonment.* *See* "Analysis of the Bankruptcy Reform Act of 1978," 1979 *Annual Survey of Bankruptcy Law* 322 (W. Norton, ed.).

This pre-Code case law clearly indicates that the trustee's right to abandon burdensome property was not absolute and superior to the requirements of other federal and state laws. In discussing a trustee's right to abandon burdensome property prior to the enactment of 11 *U.S.C.* § 554, *Collier on Bankruptcy* stated that although a trustee "may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate . . . [r]ecent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature." 4A *Collier on Bankruptcy* § 70.42(2) (14th ed.) (footnote omitted).

Several pre-Code cases established this restriction on the trustee's right to abandon worthless or burdensome property. *Ottenheimer v. Whitaker,* 198 *F.*2d 289 (4th Cir. 1952), involved facts and issues analogous to those at bar. In *Ottenheimer,* the trustee in bankruptcy petitioned the court for leave to abandon certain floating barges that were burdensome to the estate. The abandonment was opposed by the Harbor Engineer of the City of Baltimore and the United States Army Corps of Engineers on the ground that the proposed abandonment would

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* It should be noted that the only differences between proposed Section 4-611 and Section 554 are procedural in nature. The standards for abandonment contained in the two provisions are nearly identical.

violate 33 *U.S.C.* § 409, which made it unlawful to sink voluntarily or cause to be sunk vessels in navigable channels. In addition, the barges were in a dilapidated and unsafe condition and would sink at anchorage if abandoned. The court not only denied the trustee permission to abandon the barges, but directed him to remove them from the anchorage and mandated that the cost of removal be borne by the bankrupt estate as a cost of administration. The court also pointed out that the general rule permitting a trustee to refuse acceptance of property of an onerous or unprofitable nature would have applied were it not for the unusual consequences that would follow:

> There can be no doubt that the property not only has no value, but also that the care and disposition of it will involve the expenditure of a substantial sum of money. But it is equally true that if the trustee abandons the barges and at the same time holds on to the valuable assets of the estate, the title to the barges will revert to the bankrupt and he will be left without means to care for or dispose of them in the manner prescribed by the statute. [198 *F.*2d at 290]

The court went on to emphasize that what was at issue was not "a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest." *Ibid.*

The Bankruptcy Court for the Eastern District of Pennsylvania reached a similar result in *In re Lewis Jones, Inc.*, 1 *Bkr. Ct. Dec.* (CRR) 277 (Bankr. E.D. Pa. 1974). In that case, the trustees of three bankrupt utility companies sought instruction from the court concerning

certain underground manholes, vents and steam pipes that could become hazardous to public health and safety if abandoned in their existing condition. These structures could be made safe by repaving, filling and sealing, but only at a very substantial cost. Interestingly, in *Lewis Jones,* no federal or state statute would have been violated had the trustees not spent the money to remove the potential hazard. Nevertheless, and despite the cost involved for the estate, the court ordered the trustees to remedy the potentially hazardous conditions.

When 11 *U.S.C.* § 554 was enacted, therefore, the public safety exception to the abandonment power was well established in the case law. Since Congress was essentially incorporating existing abandonment law into the Bankruptcy Code through § 554 (*see* note to § 4-611 of H.R. 10792, 93rd Cong., 1st Sess. (1973), cited above, and 4 *Collier on Bankruptcy* § 554.01, at 554-2 (15th ed. 1985)), Congress implicitly included the public safety exception in the abandonment provision as well. Although the legislative history of § 554 is silent on this point, such silence is "eloquent" because had Congress contemplated changing existing law, it would have made a statement to this effect. *See Edmonds v. Compagnie Generale Transatlantique,* 443 *U.S.* 256, 266 (1979) (Court interpreted federal maritime enactment as not upsetting well-established, judge-made rule of admiralty law); *Palmer v. Massachusetts,* 308 *U.S.* 79, 85 (1939) ("If this old and familiar power of the states [to regulate local railroad service] was withdrawn when Congress gave district courts bankruptcy powers over railroads, we ought to find language fitting for so drastic a change."). *Accord, NLRB v. Amax Coal Co.,* 453 *U.S.* 322, 329 (1981). In

fact, statutes should be read with a presumption favoring the retention of familiar principles, except where an explicit intent to the contrary is evident. *Ibid.; Isbrandtsen Co. v. Johnson,* 343 *U.S.* 779, 783 (1952). Moreover, when the issue raised is whether a given statutory provision is intended to abrogate traditional, well-established governmental as opposed to private rights, the presumption against such a construction of the statute is particularly strong. *United States v. Tilleraas,* 709 *F.*2d 1088, 1092 (6th Cir. 1983). These precedents counsel affirmance of the conclusion reached below that Congress did not intend to alter judge-made law in adopting 11 *U.S.C.* § 554, but rather incorporated the preexisting law, including the public safety exception, into the recent codification of the abandonment power.

B. The Abandonment Of PCB-Contaminated Waste Oil By The Trustee In This Case Was Improper Because Such Abandonment Violated State And Federal Law And Threatened The Public Health And The Environment.

When the trustee proposed to abandon the PCB-contaminated waste oil at the Quanta facility in Edgewater, New Jersey, the oil was leaking from poorly maintained tanks onto the ground and into the Hudson River. The undisputed evidence before the Bankruptcy Court established that pollution control equipment was inoperative, and that conditions at the facility were so poor that tank ruptures resulting in large spills to the River were feared. Affidavit of Frank Gagliano, Senior Environmental Specialist, NJDEP (R.45-47). Although the trustee had had control of Quanta's property and assets from November

1981 through October 1982 when abandonment of the waste oil was first proposed, he had not stabilized the tanks, stopped the leaks, or performed any other remedial measures. Rather than acting to address the environmental threat at the site, the trustee simply sought to abandon the contaminated oil, presumably to the assetless debtor. (Abandonment is to the debtor, or to any other person with a possessory interest in the property; *see* 11 *U.S.C.* § 541 and S. Rep. No. 989, 95th Cong., 2d Sess. 93 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5878.) In effect, therefore, abandonment under these circumstances would constitute the improper disposal of the hazardous wastes.

Such disposal, and the perpetuation of the poor storage conditions at the facility, violated New Jersey's Solid Waste Management Act which governs the storage, treatment, processing, and final disposal of waste materials (including waste oil) in the State, and prohibits the kind of improper storage and disposal that occurred at the Quanta facility. *N.J.S.A.* 13:1E-1 *et seq.; see also N.J.A.C.* 7:26-1 *et seq.* Similarly, the abandonment of the PCB-contaminated waste oil contravened the federal Toxic Substances Control Act ("TSCA"), 15 *U.S.C.* § 2601 *et seq.,* which closely regulates the use, storage, and disposal of PCB's. *See* 40 *C.F.R.* § 761.3 which defines "disposal" broadly to include actions terminating the useful life of PCB items, and actions relating to the containment or confinement of PCB items. Under TSCA, the disposal of PCB items is prohibited except in specifically designated incinerators or in secured chemical waste landfills. 15 *U.S.C.* § 2605(e).

Since the trustee's abandonment of the contaminated oil to the assetless debtor resulted in continued deterioration of the tanks and the continued leaking and spilling of hazardous substances into the waters of the State, this action also constituted a violation of New Jersey's Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11a *et seq.* This statute prohibits the discharge of hazardous substances and defines "discharge" broadly as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substance into the waters of the State or onto lands from which it might flow or drain into said waters. . . ." *N.J.S.A.* 58:10-23.11b(h). The New Jersey Water Pollution Control Act, *N.J.S.A.* 58:10A-1 *et seq.* also prohibits discharges of pollutants into the waters of the State except in conformity with a valid permit. Similarly, "releases" of hazardous substances into the environment are prohibited under federal law by CERCLA, 42 *U.S.C.* § 9601 *et seq.*

Petitioners argue, however, that abandonment of hazardous wastes by the trustee would not violate any State or federal environmental law because when a trustee abandons property, title to the abandoned property revests in the debtor as of the date of the commencement of the bankruptcy proceedings. Petitioners fail to recognize, however, that this reversion applies only to the property's title. *Mason v. Commissioner of Internal Revenue,* 646 *F.*2d 1309, 1310 (9th Cir. 1980) ("the title reverts to the bankrupt, *nunc pro tunc.*"). In this case, the trustee of the estate is required to comply with the environmental laws at issue because of his control and possession of

property of the estate, not because he has title to the property. *See Ohio v. Kovacs,* 105 *S.Ct.* 705, 711-712 (1985). As a result, although the debtor may be treated as having had continuous title to the property that is abandoned by the trustee, this legal doctrine does not free the trustee from a duty to comply with environmental laws. *Ibid.* This doctrine of continuous title should not be expanded to encompass reversion of possession and control of property of the estate as of the date of the bankruptcy petition. The doctrine is but a legal fiction and should apply only if it achieves a just result. *Wallace v. Lawrence Warehouse Co.,* 338 *F.*2d 392, 394 n.1 (9th Cir. 1964). Since application of this legal fiction here would frustrate rather than promote a just result, and would undermine this Court's observation in *Kovacs* that a trustee in liquidation must comply with valid state environmental laws, 105 *S.Ct.* at 711-712, it is clear that expansion of this legal fiction must be rejected.

Although abandonment of the contaminated oil by the trustee violates the State and federal laws noted above, the trustee would be liable to ensure compliance with these enactments only in his capacity as the representative of the estate. 11 *U.S.C.* §323. Absent malfeasance by the trustee (which is not alleged here), there would be no personal liability for the trustee under the environmental laws in this case, therefore, but rather liability extending only to the assets of the estate he is administering. Trustee O'Neill's dire predictions about the potential personal consequences to a trustee when abandonment is disallowed are thus unfounded.

Similarly unfounded are petitioners' assertions that the State or federal government should finance all of the

remedial work needed at the Edgewater site despite the availability of assets in the Quanta estate that could be used, at the very least, to provide some stabilization and cleanup activity. First, both New Jersey and federal law reflect a legislative policy favoring responsible party cleanups whenever private funds are available. *N.J.S.A.* 58:10-23.11 *et seq.*, (Spill Act); 42 *U.S.C.* § 9601 *et seq.*, (CERCLA). *See also* H. Rep. No. 1016, Pt.I, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 6119, 6120, where it was noted that one objective of the liability provisions in CERCLA was "to induce such [liable] persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." The Spill Act goes as far as to make State expenditures a lien against the property of the discharger, with priority in some circumstances over other liens, in order to enhance the State's access to private funds for cleanup work. *N.J.S.A.* 58:10-23.11f(f); *Kessler v. Tarrats,* 194 *N.J.Super.* 136, 146, 476 *A.*2d 326, 331 (App. Div. 1984). This emphasis on private funding of cleanups whenever possible stems from a recognition that government funding is simply not sufficient to cover the vast number of cleanups that must be undertaken to protect the public health and the environment. In enacting CERCLA, Congress directed that federally funded cleanups proceed according to a priority list (42 *U.S.C.* §9605), and acknowledged that the moneys it was making available would allow for cleanups at only the most hazardous sites. *See* S.Rep. No. 848, 96th Cong., 2d Sess. at 17. Given these circumstances, the government's access to private funds for cleanup purposes must be assured whenever possible, including when private funds are available from an estate in

liquidation. Here, the trustee's action deprived New Jersey of assets in the Quanta estate, maintained a hazardous condition at the Edgewater site, and delayed cleanup activities for several years. Endorsing the State's position in this case would ensure that such an unfortunate scenario is never repeated.

In conclusion, it is beyond doubt that the hazardous conditions at the Quanta site and the trustee's failure to take any action whatsoever to remedy those conditions constituted a nuisance and violated many State and federal laws enacted to protect the public. Abandonment under these circumstances would be at least as ill-advised as the abandonment of the barges in *Ottenheimer v. Whitaker, supra,* 198 *F.*2d at 290, or the abandonment of the faulty pipes, vents, and manholes in *Lewis Jones, supra,* 1 Bankr. Ct. Sec. at 280. Indeed, abandonment here would in all likelihood be much more dangerous. The court below thus correctly invoked the public safety exception to the abandonment power implicit in 11 *U.S.C.* §554 in finding abandonment of the contaminated waste oil improper.

POINT II

THE ENFORCEMENT OF STATE REGULATORY LAWS DESIGNED TO PROTECT THE PUBLIC AGAINST A CORPORATION IN LIQUIDATION DOES NOT FRUSTRATE FEDERAL BANKRUPTCY OBJECTIVES AND THUS COMPLIES WITH THE SUPREMACY CLAUSE.

Petitioners argue that the enforcement of State police power laws to limit abandonment under 11 *U.S.C.* § 554 frustrates the objectives of federal bankruptcy law and is consequently preempted by the Supremacy Clause

of the Constitution, Art. VI, cl. 2. Since Congress incorporated judge-made law into its codification of the abandonment power—including the judicially-formulated public safety exception—the enforcement of State laws to protect the public is completely consistent with federal bankruptcy law. *See* Point I, *supra.* No question of preemption thus arises in this case. Even if one were to view § 554 independently of pre-Code abandonment law, however, the enforcement of State public health and safety laws should nonetheless be upheld against a Supremacy Clause challenge because Congress, in adopting bankruptcy legislation, fully intended neither to abrogate the police powers of the states nor to provide a haven for polluters.

As the court below noted, preemption analysis starts with the basic assumption that Congress did not intend to displace State law, citing *Maryland v. Louisiana,* 452 *U.S.* 725, 746 (1981). State laws are thus presumed valid under the Supremacy Clause, and preemption is disfavored, to be found only in the clearest cases of conflict. *Ibid.; Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.,* 450 *U.S.* 311, 317 (1981). This presumption of validity requires that exhaustive attempts to harmonize state and federal laws be made; only where that search for accommodation fails will the statute be stricken. *Florida Lime and Avocado Growers v. Paul,* 373 *U.S.* 132, 141-143 (1963).

Since this case involves the police powers of the states, it is also important to note that these powers are among the "least limitable" of all governmental powers. *Queenside Hills Realty Co. v. Saxl,* 328 *U.S.* 80, 82 (1946).

The authority of states to regulate businesses and property within their jurisdictions to prevent and abate health hazards and public nuisances has long been recognized as a primary function of the police power. *Northwestern Fertilizing Co. v. Hyde Park,* 97 *U.S.* 659 (1878). And where such historic police powers of the states are challenged under the Supremacy Clause, they must not be superseded "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 *U.S.* 218, 230 (1947). Preemption analysis thus requires careful scrutiny of each of the laws in question to determine whether the exercise of state powers would constitute an obstacle to the effectuation of federal objectives. *Perez v. Campbell,* 402 *U.S.* 637, 649 (1971).

In enacting 11 *U.S.C.* § 554 and permitting a trustee in bankruptcy to abandon property that was worthless or burdensome, Congress sought to facilitate the reduction of the debtor's property to money for distribution to creditors. 4 *Collier on Bankruptcy* § 554.01 (15th ed. 1985). In liquidation proceedings, it is the responsibility of the trustee to collect the debtor's assets, reduce them to money, and then distribute the property of the estate. 11 *U.S.C.* § 704. The ability to abandon burdensome property consequently assists the trustee in the administration of the estate and serves the interests of creditors by speeding settlement of their claims.

The purpose of the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11a *et seq.,* is to protect the public and the environment by prohibiting the discharge of hazardous substances. Where discharges have occurred, the Spill Act provides for liability against responsible parties

for cleanup costs and other damages associated with the discharge. *N.J.S.A.* 58:10-23.11f; *N.J.S.A.* 58:10-23.11g. The purpose of the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.*, is to regulate the storage, treatment, and disposal of waste to ensure that these activities are performed properly in furtherance of the public interest.

To ascertain congressional intent as to the interaction of § 554 and public safety regulations, it is necessary to look beyond the abandonment provision to the bankruptcy laws as a whole. For, "[w]hen 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . .'" *Kokoszka v. Belford,* 417 *U.S.* 642, 650 (1974), quoting *Brown v. Duchesne,* 60 *U.S.* (19 *How.*) 183 (1857). In looking beyond § 554, it is evident that Congress did not intend the bankruptcy laws to abrogate the enforcement of police power regulations by the states.

A primary example of this policy is found in the automatic stay provision of the Bankruptcy Code. There Congress specifically provided that the filing of a bankruptcy petition would not operate as a stay "of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 *U.S.C.* § 362(b) (4). *See also* 11 *U.S.C.* § 362(b) (5) which exempts from the automatic stay the enforcement of all pre-petition judgments, except for money judgments, that were obtained in an action by a governmental unit to enforce its police

or regulatory powers; *Ohio v. Kovacs, supra,* 105 *S.Ct.* at 711 n. 11; *Penn Terra Ltd. v. Dept. of Env. Resources,* 733 *F.*2d 267, 272-273 (3d Cir. 1984) (upholding enforcement of State anti-pollution laws through execution of pre-petition judgment as consistent with exception to automatic stay under 11 *U.S.C.* § 362(b) (5), despite the fact that compliance with the judgment by the company would deplete assets otherwise available to creditors). Congress crafted these exceptions to the automatic stay so that they would apply "where a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection . . . laws, or attempting to fix damages for violation of such a law." S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5838. The need for these exceptions arose because under prior law the bankruptcy stay had been abused to restrict enforcement of vital government regulations. These abuses were typified by the order of a bankruptcy court preventing a state from closing a debtor's plant that was polluting a river in violation of the state's environmental protection laws. H. Rep. No. 595, 95th Cong., 1st Sess. 174-175 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 6135. By adopting 11 *U.S.C.* § 362(b) (4) and (5), Congress demonstrated unequivocally that bankruptcy laws should not be permitted to override vital state police power regulations. This congressional action establishes that when public safety is at issue, bankruptcy policy must yield to higher priorities. *Penn Terra Ltd. v. Dept. of Env. Resources, supra,* 733 *F.*2d at 278; *Matter of Canarico Quarries, Inc.,* 466 *F.Supp.* 1333, 1337 (D.P.R. 1979) (court refused to stay environmental agency from executing an agreement

in which the debtor was required to install air pollution control equipment despite the significant cost of these measures).

A similar conclusion is drawn from reference to 28 *U.S.C.* § 959(b) which explicitly requires the trustee in his management and control of the property of the estate to obey all valid state laws. 28 *U.S.C.* § 959(b) provides, in relevant part:

> . . . a trustee . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

This statute demonstrates that Congress did not intend to permit trustees to abandon worthless property when such abandonment would violate state law. In this instance, for example, because the abandonment of the Edgewater facility with its hundreds of thousands of gallons of PCB-contaminated materials would violate New Jersey law, abandonment would directly conflict with the requirements of § 959(b) and would be prohibited.

Petitioners dispute this reliance on 28 *U.S.C.* 959(b), however, alleging that this statutory provision applies only in the Chapter 11 reorganization context and does not cover a business in liquidation. The court below questioned this unduly narrow interpretation, and declined to endorse it. This Court should follow that lead by holding that § 959(b) applies to liquidations as well as to reorganizations.

First, Congress used the word "manage" in § 959(b). This term encompasses both administering an estate and

conducting a business. *See* Black's Law Dictionary 865 (rev. 5th ed. 1979), defining "manage" as "to control and direct, to administer, to take charge of. To conduct; to carry on the concerns of a business or establishment." *Accord, Webster's Third New International Dictionary* 1372 (1976), defining "manage" as "to control and direct" or "administer." There consequently is no basis in the statutory language for limiting § 959(b) to the reorganization context.

Moreover, in 28 *U.S.C.* § 959(a), Congress provided that, "Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions *in carrying on business* connected with such property." (emphasis added). This provision has been interpreted to refer to the operation of a business under a Chapter 11 reorganization plan. *Matter of Campbell,* 13 *Bankr.* 974, 976 (D. Idaho, 1981). Should Congress have wanted to limit § 959(b) in similar fashion, it would have repeated the same statutory language. Instead, Congress broadened the effect of the obligation to comply with State law beyond the context of "carrying on business" to reach all activities involved in managing a property in bankruptcy, including a business in liquidation, except for those activities expressly excluded from the reach of § 959(b), and not relevant here.

Perhaps even more telling in regard to the reach of § 959(b) is that Congress made the *possession* of property the pivotal concept for coverage, requiring the trustee to manage property in his possession in the same manner—and subject to the same laws—that the owner would be bound to follow if the property were in his possession.

The concept of possession applies in liquidation as well as in reorganization. In cases under all chapters, the trustee is the representative of the estate. 11 *U.S.C.* § 323(a). In this capacity, the trustee acquires control over and possession of the property of the estate, and may use, sell, or lease the property after notice and hearing. 11 *U.S.C.* § 363(b)(1). Since the trustee in liquidation cases certainly "manages" the property of the estate in his "possession," as the trustee here managed the Quanta estate in the process of selling and abandoning the debtor's property, such administrative actions must comply with "the valid laws of the State in which such property is situated." 28 *U.S.C.* § 959(b). Petitioners have cited no case law on point to the contrary.* Indeed, in *In re Chicago Rapid Transit Co., supra,* 129 *F.*2d at 5-9, the court relied upon the statutory predecessor of § 959(b) in directing the trustee to comply with state law in his attempt to liquidate a part of the debtor's business. The state law in issue there prohibited the trustee from discontinuing service on a branch railway line until receiving permission from the Illinois Commerce Commission. Rather than creating obligations for the corporation in the conduct of its business, this type of regulation concerns the fundamental managerial perrogative, *i.e.*, whether to conduct business at all. Accordingly, the *Chicago Rapid*

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* Although petitioners cite *State of Missouri v. U.S. Bankruptcy Court,* 647 F.2d 768, 778 (8th Cir. 1981), *cert. den.* 454 *U.S.* 1162 (1982), to support their argument that § 959(b) applies only in the reorganization context, the Court of Appeals there expressly refused to decide this issue, and did not discuss it thoroughly. Moreover, the context of the *Missouri* case involved a financial responsibility law that went more to the pecuniary interests of the state than to its regulatory interests and thus is distinguishable from the instant matter.

Transit case presents an instance in which a trustee was required to comply with valid State laws in his management of the estate. This precedent lends support to an interpretation of § 959(b) that reaches the administration context, including the administration of an estate in liquidation.* *See also Ohio v. Kovacs, supra,* 105 *S.Ct.* at 711-712, where the Court noted that it did not question the responsibility of anyone in possession of a hazardous waste site—including a trustee in bankruptcy in a liquidation proceeding—to comply with state environmental laws.

Courts regularly apply 28 *U.S.C.* §959(b) to require bankruptcy trustees to comply with State law. In *Gillis v. California,* 293 *U.S.* 62 (1934), a receiver of a corporation in reorganization asked the Court to sanction noncompliance with a state licensing law, contending that the exemption was necessary to keep the business in operation. Citing the statutory predecessor to § 959(b), the Court denied the request and upheld the applicability of the state licensing requirements despite the consequences

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* Although petitioners cite 2 *Moore's Federal Practice* (2d ed. 1982) § 66.04[4] for the proposition that 28 *U.S.C.* § 959(b) requires a trustee to adhere to state law only when operating a business under a Chapter 11 reorganization plan, this reliance is misplaced. In context, the excerpt from *Moore's* establishes merely that § 959(b) does not compel the trustee to obey state laws governing preferences in the distribution of funds. The correctness of this interpretation of *Moore's* is established by an examination of the entire paragraph and by the case cited there, *First Nat. Bank v. Ewing,* 103 *F.*2d 168, 193-195 (5th Cir. 1900), *cert. den.* 179 *U.S.* 686 (1900) (holding that the statutory predecessor of § 959(b) did not require a trustee to obey state laws defining the priority of creditors). The treatise does not address the issue of import here: whether § 959(b) compels a trustee in possession of a debtor's property to adhere to State law in his management of that property in the course of a liquidation proceeding.

to the business. *See also Matter of Canarico Quarries, Inc., supra,* 466 *F.Supp.* at 1339 (holding that § 959(b) requires compliance with environmental regulations despite the cost); *Colonial Tavern, Inc. v. Byrne,* 420 *F.Supp.* 44 (D. Mass. 1976) (suspension of liquor license upheld for repeated violations of midnight closing hour regulations); *Commonwealth v. Peggs Run Coal Co.,* 423 *A.*2d 765 (Pa. Commw. Ct. 1980) (allowing the closing of a coal production facility which was violating local environmental resource laws). Although these cases arose in the reorganization context, they support applying § 959(b) in liquidation proceedings as well. For the courts in those reorganization cases were willing to apply state laws even though that action would frustrate both the interests of creditors who wanted to preserve the estate to maximize their own recoveries, and the debtor's interest in rehabilitating the business. Since only the former concern of the creditors would be thwarted in the liquidation context, there is no reason not to apply § 959(b) to liquidations where—if anything—the application of state law would have less of an impact on bankruptcy proceedings than in the reorganization context.

Section 959(b) thus reflects a definite legislative intent to require compliance with state police power regulations. When viewed together with the exception to the automatic stay for governmental enforcement actions of a public safety nature, 11 *U.S.C.* § 362(b) (4), a clear congressional policy favoring the maintenance of state regulatory activities in the bankruptcy context emerges. Interpreting 11 *U.S.C.* § 554 to allow for an exception to the abandonment power where the public would be at risk and state law violated consequently complies with the objectives of Congress and the dictates of the Supremacy Clause.

Although the court below limited its discussion of public safety regulations to those contained in state law, it is beyond question that federal environmental laws also apply to this matter and were violated by the improper storage and continuing leaks of contaminated oil at the Quanta site. Such federal violations have in fact been confirmed by the recent removal action taken by the United States Environmental Protection Agency at the Edgewater facility under CERCLA, 42 *U.S.C.* § 9601 *et seq. See also* TSCA, 15 *U.S.C.* § 2601 *et seq.* Viewing the issue here solely as one of preemption is thus shortsighted. For the interaction of the bankruptcy and environmental laws also raises questions concerning the relationship between federal enactments with decidedly different purposes. In such a situation, courts are required to regard each statute as effective whenever—as is the case here—they are capable of coexistence and there is no clearly expressed congressional intent to the contrary. *See Ruckelshaus v. Monsanto Co., supra,* 104 *S.Ct.* at 2881; *Morton v. Mancari,* 417 *U.S.* 535, 551 (1974). Consideration of this factor bolsters NJDEP's position that state as well as federal environmental laws should be given full effect in the bankruptcy context.

Despite the claims of petitioners, upholding the public safety exception to the abandonment power and allowing enforcement of either or both state and federal environmental laws does not run counter to this Court's recent decision in *Ohio v. Kovacs, supra,* 105 *S.Ct.* at 705. At issue in *Kovacs* was the extremely narrow question of whether a pre-bankruptcy obligation of an individual (as

opposed to a corporate) debtor to comply with a state court injunction requiring him to clean up a hazardous waste site was a "debt" that was "dischargeable" under the Bankruptcy Code. *See* 11 *U.S.C.* § 101(4)(B); 11 *U.S.C.* § 727(b). In *Kovacs,* the debtor had been removed from control of the waste site prior to a bankruptcy filing, and had been replaced by a receiver who was directed to comply with the injunction that the debtor had failed to implement. Subsequently, after the bankruptcy filing, Ohio sought to obtain part of the debtor's post-bankruptcy income for use in completing the cleanup. Since the receivership had effectively prevented the debtor from carrying out the cleanup himself, the Court held that the cleanup obligation had been converted into an obligation to pay money—an obligation that was dischargeable through bankruptcy. 105 *S.Ct.* at 710-711.

In reaching this conclusion, the Court in *Kovacs* distinguished *Penn Terra, Ltd. v. Dept. of Env. Resources, supra,* 733 *F.*2d at 267, which had found that a state action seeking an injunction against a bankrupt and requiring compliance with environmental laws was not a suit to enforce a money judgment, but rather an action to enforce the police powers of the State and thus was exempt from the automatic stay. 105 *S.Ct.* at 711 n. 11. Similarly, NJDEP's administrative order directing Quanta to remedy the hazardous discharges at the site and to remove the contaminated oil, and the State's opposition to abandonment as constituting a violation of the environmental laws, represents State action taken in a police power, and not a pecuniary capacity. *Kovacs* is distinguishable from the instant case on this ground. Although a footnote in *Kovacs* referred to a hypothetical situation where a trustee would abandon property under 11 *U.S.C.* § 554 to the debtor if the polluted property were worth less than the cost of cleanup, 105 *S.Ct.* at 711 n. 12, this suggestion did not absolve the trustee or the debtor from complying with State environmental laws while the property was in their possession. In fact, the Court specifically asserted that, "we do not question that anyone in possession of the site—whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio." 105 *S.Ct.* at 711-712. Nor did the Court address the public safety exception to the abandonment power which is at the heart of this case. The question here—upon which *Kovacs* is silent—is whether abandonment to an assetless corporate shell is appropriate in the face of an ongoing discharge of hazardous substances where the trustee has assets available to finance some remedial or stabilization activity, has refused to use those assets to fund any cleanup action whatsoever, and where abandonment would be tantamount to disposal of the waste oil and rendering the site a ward of the government. Under these circumstances, as demonstrated above, abandonment would be both inappropriate and dangerous. *Kovacs* does not hold to the contrary.

The distinction made in *Kovacs* and in *Penn Terra, supra,* 733 *F.*2d at 267, between state actions of a police power and a pecuniary nature is a critical one, however. It is a distinction codified in the automatic stay provision, 11 *U.S.C.* §362, and a distinction that arises in non-bankruptcy contexts such as interstate commerce. *See Reeves, Inc. v. Stake,* 447 *U.S.* 429, 439 (1980) (distinguishing be-

tween states as market participants and as market regulators for purposes of the Commerce Clause). The automatic stay provision is particularly illuminating in this regard because it clearly reflects a distinction made by Congress in the bankruptcy context between government as regulator and government as creditor. *See In re Thomassen,* 15 *Bankr.* 907, 909 (Bankr. 9th Cir. 1981); H. Rep. No. 95-595, 95th Cong., 1st Sess. at 343, *reprinted in* 1978 *U.S. Code Cong. & Admin. News* at 6299. Petitioners' failure to see this distinction, and their mischaracterization of NJDEP as a creditor, have led them to assert that the Supremacy Clause requires abandonment in this case because, absent that, states would be able to devise a preference over other creditors that would frustrate the priority distribution system established in the Bankruptcy Code. Analysis of this contention demonstrates that petitioners have manufactured a conflict between the Code and police power regulations where no real conflict exists.

In seeking to enforce compliance by the trustee with applicable environmental protection laws, the State is plainly acting in its regulatory capacity. The State's enforcement of its environmental regulations seeks compliance by the trustee with the law in the same manner as any similarly situated party; it does not constitute the act of a creditor trying to devise a preference over other creditors. *See In re Dolly Madison Industries, Inc.,* 504 *F.*2d 499, 503 (3d Cir. 1974) ("The mere fact that the debtor's property may be affected by state law does not constitute a 'claim' against that 'property' . . . ").

The flaw in petitioners' characterization of the environmental enforcement actions of the State as the acts of a

creditor is amply demonstrated by extending petitioners' interpretation to other sections of the Code. For example, if the State's enforcement actions constitute acts of a creditor, then any expenditures to ensure compliance with pollution laws made by a debtor within 90 days before filing of its bankruptcy petition would be subject to avoidance by the trustee as a preferential transfer. 11 *U.S.C.* §547(b). In that event, the State would be required to reimburse the estate for the cost of the environmental protection measures undertaken by the debtor immediately before its bankruptcy filing. The absurdity of this statutory interpretation demonstrates the fundamental error in petitioners' characterization of the State as a creditor in this instance. Because the State's efforts to ensure compliance with the environmental laws are actions in its regulatory capacity, its actions in no way frustrate the distributional priorities set forth in the Code.

Finally, petitioner Midlantic National Bank has asserted that the provisions of the Environmental Cleanup Responsibility Act ("ECRA"), *N.J.S.A.* 13:1K-6 *et seq.,* enacted by the New Jersey Legislature on September 2, 1983, conflict with federal bankruptcy law and must be invalidated under the Supremacy Clause. The short answer to this contention is that the statute does not apply here because ECRA did not exist in May 1983 when the Bankruptcy Court approved abandonment of the contaminated waste oil, and hence was not addressed below. Midlantic's preemption challenge to ECRA thus has no place in this lawsuit and should be dismissed by the Court. Were the issue to be entertained, however, the preemption challenge should be rejected because ECRA is fundamentally a state law that defines property rights and "Congress

has generally left the determination of property rights in the assets of a bankrupt estate to state law." *Butner v. United States,* 440 *U.S.* 48, 54 (1979), cited in *Ohio v. Kovacs, supra,* 105 *S.Ct.* at 712 (O'Connor, J. concurring). *See Johnson v. First Nat'l Bank of Montevideo,* 719 *F.*2d 270, 273 (8th Cir. 1983) (state property law is not preempted and governs in bankruptcy unless state law and Bankruptcy Code are in actual conflict). In fact, the legislative requirements imposed by ECRA represent just the kind of statutory solution proposed by Justice O'Connor to protect the state's right to the assets of a bankrupt for cleanup purposes. *Ibid.*

Neither ECRA nor the enforcement of other state environmental laws to prevent abandonment and protect the public safety stand as an obstacle to the achievement of congressional bankruptcy objectives. This Court must consequently reject petitioners' unfounded preemption challenge and affirm the decision below.

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POINT III

THE ENFORCEMENT OF THE PUBLIC SAFETY EXCEPTION TO THE ABANDONMENT POWER POSSESSED BY A TRUSTEE IN BANKRUPTCY DOES NOT "TAKE" THE PROPERTY OF CREDITORS AND THUS IS CONSISTENT WITH THE TAKING CLAUSE OF THE CONSTITUTION.

Although the court below held that abandonment would not be appropriate in this case because of the public health risk associated with such an action, it expressly refused

to reach the issue of how the remaining assets in the estate should be distributed. 739 *F.*2d at 923. In regard to the New Jersey case, the court stated that, "The issue is not who should pay to clean up the estate's property; it is whether the Trustee's interest in preserving the estate should prevail over the public's interest in containing the hazards produced by toxic wastes in the possession of the estate." 739 *F.*2d at 929. In light of this holding, the court remanded the cases to the Bankruptcy Court for further proceedings, including the development of a factual record and a determination of the priority, if any, of the rights of the states to the remaining assets. *Ibid.;* 739 *F.*2d at 923. The record before this Court thus fails to reveal the impact on Quanta's creditors of the decision to prevent abandonment of the contaminated oil. The assertion made by petitioners that interpreting 11 *U.S.C.* §554 to prevent abandonment here "takes" the property of creditors without just compensation is consequently premature at best and should not be addressed by this Court. Even if one assumes that most, or all, of the assets in the Quanta estate would be used—absent abandonment—to stabilize the leaky tanks and otherwise perform remedial activities at the Edgewater site, however, such use of the assets would not represent a "taking" in the constitutional sense.

First, petitioners apparently concede that the application of environmental laws to a corporation not seeking the protection of the Bankruptcy Code presents no constitutional infirmity even though compliance with these regulations can require the expenditure of substantial sums of money. Indeed, given the paramount public purpose served

by protecting the public and the environment from exposure to toxic contaminants, it cannot be doubted that these laws are proper governmental enactments that do not constitute an illegal taking of private property. *See generally Ruckelshaus v. Monsanto Co., supra,* 104 *S.Ct.* at 2875-2876, where the Court noted in regard to pesticide regulations that, "such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'" (citations omitted). Although the Third Circuit did not decide the "taking" issue and remanded both the New York and New Jersey cases to the Bankruptcy Court for the development of a factual record regarding a distribution of assets, the court did cite numerous precedents rejecting taking challenges when the state had exercised its regulatory powers to promote the public good. 739 *F.*2d at 922 n. 11. Of particular note among the cases cited are *Goldblatt v. Town of Hempstead,* 369 *U.S.* 590 (1962) (upholding a local ordinance prohibiting excavation below the water table as a valid exercise of the police power despite the fact that the ordinance prevented an excavating company from carrying on its business as intended), and *Miller v. Schoene,* 276 *U.S.* 272 (1928) (upholding against a "taking" challege the destruction of red cedar trees to prevent the spread of rust disease harmful to apple orchards in the vicinity).

In spite of the unquestionable constitutionality of laws governing hazardous waste disposal, petitioners argue that enforcement of environmental laws of general applicability in the context of a corporation in bankruptcy liquidation will constitute a taking of the property in-

terests of secured creditors.* This contention is grounded on the assumption that because the cost of stabilizing and properly disposing of the PCB-contaminated oil will exceed the value of the collateral to which their secured interest attaches, application of environmental regulations will *a fortiori* constitute a governmental taking of their security interest. This constricted analysis fails to assess accurately the nature of the governmental and private interests at issue in this matter, and must be rejected.

State and federal laws governing the storage, disposal, and discharge of PCB-contaminated waste oil are of universal application and applied to Quanta throughout its operating life. During that period, Quanta at all times was legally responsible for rejecting PCB's and, failing that, for ensuring the proper containment and disposal of the contaminated oil. *See generally* the Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* (enacted in 1970), and the regulations adopted thereunder, *N.J.A.C.* 7:26-1 *et seq.;* the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11a *et seq.* (enacted in 1977); TSCA, 15 *U.S.C.* § 2601 *et seq.* (enacted in 1976); and CERCLA, 42 *U.S.C.* § 9601 *et seq.* (enacted in 1980). It is difficult to understand how these valid police power regulations are transformed into unconstitutional takings simply be-

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* Although the trustee of the Quanta estate implies that the property rights of unsecured creditors will be taken unless abandonment is permitted in this matter, see Brief for Petitioner Thomas J. O'Neill, Trustee, at 12, it is highly unlikely that unsecured creditors will receive any distribution from the Quanta estate, regardless of the resolution of the abandonment question and related legal issues. As a result, the discussion in this brief will be confined to an analysis of the claims of secured creditors of the estate.

cause of the insolvency of a corporation which is subject to the laws.

Despite the contentions of Midlantic, the enforcement of these toxic waste laws in bankrutpcy is neither unfair nor unconstitutional. For when Midlantic made its loan to Quanta, it did so against a backdrop of environmental laws that placed Quanta in a highly regulated business. *See, e.g., N.J.S.A.* 13:1E-1 *et seq.; N.J.S.A.* 58:10-23.11a *et seq.;* 15 *U.S.C.* § 2601 *et seq.;* 42 *U.S.C.* § 9601 *et seq.* Midlantic thus knew—or should have known—that Quanta had a legal obligation to operate its potentially hazardous business in accord with applicable police power regulations enacted to protect the public. These legal responsibilities and the concomitant financial obligations associated with compliance significantly increased the risk of Quanta's insolvency and of the erosion or destruction of the collateral to which Midlantic's security interest attached. Had Quanta complied with the environmental laws to the fullest of its ability prior to the filing of its bankruptcy petition, the collateral to which Midlantic asserts a claim would have been exhausted and never become part of the estate.

The Bankruptcy Code, by not permitting abandonment in these circumstances and by requiring compliance with the environmental laws, recognizes the extremely risky position in which the bank had placed itself and seeks to ensure that the bankruptcy process does not improve this position. In making a loan to Quanta, Midlantic must have assumed that the corporation was sufficiently viable to pay off the loan while complying with the environmental laws. By arguing now that the estate

need not comply with these same regulations, Midlantic is trying to alter the risk that it voluntarily accepted in the loan transaction, and is seeking to transfer that risk to the public. As this Court has previously recognized, "it is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments," *New Haven Inclusion Cases,* 399 *U.S.* 392, 492 (1970), quoting *Penn-Central Merger Cases,* 389 *U.S.* 486, 510 (1968). Far from constituting a "taking," therefore, interpreting 11 *U.S.C.* § 554 to prevent abandonment in this case would simply prevent Midlantic from transferring to the public a financial risk it knowingly assumed.

A key element in this analysis is that the value of Midlantic's security interest was diminished by the illegal actions of Quanta in accepting PCB wastes at the Edgewater facility, and not by governmental regulation of the contaminated property. A New Jersey court has recognized this proposition in a context similar to the one here. In upholding against a taking challenge the priority lien provision of the Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11f(f), the court in *Kessler v. Tarrats, supra,* 194 *N.J. Super.* at 136, 476 *A.*2d at 326, asserted that:

> The State's involvement with this property began because of the contamination of the premises with hazardous substances. We cannot in this discussion overlook the negative impact on property values by the presence of toxic wastes; the unquestioned authority of the State to require abatement of a health nuisance, and the ability of government to close down a property or facility which creates a public health menace. See *Paterson v. Fargo Realty, Inc.,* 174

> *N.J. Super.* 178, 183 (Cty. D.Ct. 1980). The illegal dischargers are responsible for the physical damage to the property and any corresponding diminution in market value thereof. Whatever diminution in value may have occurred to affect plaintiff's security interest was as the result of the acts of polluting the property. Therefore, whatever property, if any, was "taken" was taken by the dischargers of the hazardous substances and not by the State. [194 *N.J. Super.* at 146-147; 476 *A.*2d at 332].

Application of the *Kessler* analysis to the facts of the instant case demonstrates that no governmental taking of property has occurred, for the Constitution does not require the states to indemnify creditors for bad business decisions.

When Quanta violated the environmental laws, it also betrayed the trust of Midlantic. Although Midlantic wants to protect its security interest despite this betrayal and the consequences to the public of Quanta's illegal action, the rights of creditors are not absolute. Indeed, the public interest takes precedence and "is not merely a pawn to be sacrificed for the strategic purpose or protection of a class of security holders." *Penn-Central Merger Cases, supra,* 389 *U.S.* at 510-511. Such principles are even more pertinent here than in the railroad context since the public safety, and not just public convenience, is at stake. *See also Home Building & Loan Ass'n v. Blaisdell,* 290 *U.S.* 398 (1934), where the Court upheld a state law that altered pre-existing contractual agreements in order to assist homeowners caught in the economic emergency conditions caused by the Depression. The Court concluded there that states retain the power to protect the public—including the power to protect the public from the maintenance of nuisances—despite the impact that the exercise of such police powers would have on existing contracts. 290 *U.S.* at 426. Similar reasoning applies here in the "taking" context and supports the rejection of the constitutional challenge raised by petitioners.

Nothing in *United States v. Security Industrial Bank,* 459 *U.S.* 70 (1982), requires a contrary result. In that case, a "taking" challenge was brought against 11 *U.S.C.* § 522(f)(2) which permitted individual debtors in bankruptcy proceedings to avoid liens on certain property. The Court there refused to apply the statute retroactively to avoid what it found to be "substantial enough constitutional doubts to warrant" prospective operation only. The constitutional doubts in *Security Industrial Bank* arose because the bankruptcy law itself authorized the abrogation of otherwise valid and valuable security interests. No question of public safety was involved. Here, by contrast, neither the operation of the environmental laws, nor the application of the public safety exception to the abandonment power, abrogate security interests. Rather, secured creditors suffered losses at the hands of the debtor whose illegal actions diminished or destroyed the value of the security interests. All the State tried to do in preventing abandonment was to ensure that its undoubtedly constitutional regulatory laws were enforced to the greatest extent possible to protect the public. Since these facts support neither a taking violation nor create "substantial doubts" suggesting a possible taking by operation of federal or state law, *Security Industrial Bank* is inapposite.

Should this Court decide to reach the "taking" issue, therefore, it should reject petitioners' challenge and uphold the constitutionality of the public safety exception to the abandonment power.

CONCLUSION

For all of the foregoing reasons, NJDEP urges this Court to affirm the decision of the United States Court of Appeals for the Third Circuit holding that abandonment of PCB-contaminated oil by the trustee in bankruptcy was not appropriate under 11 *U.S.C.* § 554 because of the danger to the public safety associated with such abandonment.

Respectfully submitted,

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